November 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citizen Action New Mexico

Date of Filing: July 25, 2007

Case Number: TFA-0218

On July 25, 2007, Citizen Action New Mexico (the Appellant) filed an Appeal from a final determination that the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) issued on June 25, 2007. In that determination, NNSA responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. ' 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. NNSA=s determination identified one document as responsive to this request and withheld portions of it under Exemptions 2 and 5 of the FOIA. This Appeal, if granted, would require NNSA to release the information withheld under Exemptions 2 and 5 to the Appellant.

## I. Background

In a letter dated September 27, 2006, the Appellant submitted a FOIA request to NNSA for a copy of the Ten-Year Comprehensive Site Plan FY 2007-2016 prepared by Sandia National Laboratories, New Mexico (Ten-Year Plan). On June 25, 2007, NNSA issued a determination on the matter. NNSA searched and located the requested document, redacted portions of the document under Exemptions 2 and 5 of the FOIA, and released the redacted version to the Appellant.

On July 25, 2007, the Appellant filed an Appeal of the June 25, 2007 determination with the Office of Hearings and Appeals (OHA) of the DOE. In its Appeal, the Appellant challenges the withholding of information under Exemptions 2 and 5. Specifically, the Appellant asserts that the redactions made under both exemptions were not adequately explained in the determination letter. The Appellant also asserts that factual material in the responsive document was not reasonably segregated and released. *See* Appeal Letter. For these reasons, the Appellant requests that OHA direct NNSA to release the requested information.

## II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. ' 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. ' 1004.10(b)(1)-(9). The DOE

regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. ' 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). AAn agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.@ *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency=s burden of justification is substantial. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

**Exemption 2**

Exemption 2 exempts from mandatory public disclosure records that are Arelated solely to the internal personnel rules and practices of an agency.@ 5 U.S.C. ' 552 (b)(2); 10 C.F.R. ' 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature (Alow two@ information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (Ahigh two@ information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, Ahigh two@ information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the Ahigh two@ category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under Ahigh two@ must be able to show that (1) the requested information is Apredominantly internal,@ and (2) its disclosure Asignificantly risks circumvention of agency regulations or statutes.@ *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

NNSA=s Determination Letter indicates that it withheld portions of the Ten-Year Plan because it Apertains to the scale and scope of work to be accomplished in support of, as well as the identification and location of, critical operations of SNL.@ Determination Letter at 2. NNSA=s determination letter also stated that charts were withheld in their entirety Aas they detailed NNSA Mission-Essential Facilities and Infrastructure information which included the identification, as well as condition, of these buildings/facilities where operations are performed.@ *Id.* Therefore, the release of this information could Abenefit adversaries by helping them identify possible program impacts and vulnerabilities, as well as provide them the opportunity to target these facilities.@ *Id.*

The information withheld is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which Adoes not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.@ *Cox v. Dep=t of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

In addition, the information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statue to properly invoke the Ahigh two@ exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case would allow adversaries to identify program vulnerabilities and enable them to understand how to thwart protective measures currently in place. Accordingly, disclosure of the information at issue risks allowing adversaries to circumvent DOE=s efforts to comply with its regulatory mandate to provide secure and safe stewardship of its nuclear weapons complex. Although it is obvious that this Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. Therefore, because of the hazards involved in public release, we find that the information was properly withheld under the Ahigh two@ prong of Exemption 2.

The Appellant also contends that the FOIA mandates that any reasonably segregable portion of a record must be disclosed and released to a requester after the redaction of the parts which are exempt. Appeal Letter. We agree and have reviewed both the redacted and the unredacted versions of the Ten-Year Plan. We find that NNSA reasonably segregated factual material with respect to Exemption 2, including the headings, titles and page numbers, and it is clear that other factual material that was not disclosed was Ainextricably intertwined@ with the exempt material. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

**Exemption 5**

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. ' 552(b)(5); 10 C.F.R. ' 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States*, 617 F.2d at 862. In withholding portions of documents from the Appellant, NNSA relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations composing part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. The privilege is intended to promote frank and independent discussion among those responsible for making

governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the responsive document at issue, we have concluded that NNSA=s application of Exemption 5 was correct and consistent with the principles outlined above. The information withheld from the Appellant consists of recommendations and proposed policies prepared by DOE employees and intended only for internal DOE use only. The information withheld in this case properly falls within the definition of "intra-agency memoranda" in the FOIA in that the recommendations, proposed policies, and preliminary budget cost estimates contained in the material are clearly predecisional and deliberative. This planning information is subject to further agency review and does not represent final agency position. Accordingly, we hold that the recommendations, proposed policies and preliminary budget cost estimates withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

**Public Interest Determination**

The fact that material requested falls within a statutory exemption does not necessarily preclude its release to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. ' 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. ' 1004.1. Regarding the information withheld under Exemption 2, disclosing the information deleted from the responsive document is not in the public interest as this information could render DOE facilities vulnerable to attack. With respect to the information withheld under Exemption 5, no public interest would be served by release of that material, which consists solely of recommendations, proposed policies and preliminary budget cost estimates provided to DOE in the consultative process and the release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing recommendations and proposed policies, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE & 80,122 at 80,560 (1987).

It Is Therefore Ordered That:

(1) The Appeal filed by Citizen Action New Mexico, OHA Case No. TFA-0218, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. ' 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
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Office of Hearings and Appeals

Date: November 8, 2007